

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of Proposed  
Disciplinary Action Against  
the Adult Foster Care  
License of Dolores Wipper

FINDINGS OF FACT ,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on October 12, 1989 at the Stearns County Social Services Department in St. Cloud. The record closed on November 22, 1989.

Beverly Webb, Social Services Supervisor, Stearns County Social Services Department. Box 1107, 700 Mall Germain, St. Cloud, Minnesota 56302, appeared on behalf of the Stearns County Social Services Department ("Agency", "County"). The Licensee, Dolores Wipper, 106 - 15th Avenue North, St. Cloud, Minnesota 56303, appeared on her own behalf. A post-hearing brief was filed by Kathryn E. Peterson, Assistant Stearns County Attorney, Courthouse, Room 401, P.O. Box 443, St. Cloud, Minnesota 56302.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Ann Wynia, Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT\_OF ISSUE

Whether the recommendation of the Agency that disciplinary action be taken against the adult foster care license of Dolores Wipper should be affirmed.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Dolores Wipper has been a licensed provider of adult foster care services in Stearns County for approximately five years, first in Kimball, Minnesota and, since 1986, at 106 - 15th Avenue North in St. Cloud.

2. At all times relevant to this proceeding, Ms. Wipper provided adult foster care services to four adult male residents at her St. Cloud home, Alvin Evens, Ronald Golden, Mark Regan and Thomas Schoen. The men all have limited mental ability (IQs under 70) and adaptive behavior problems. They participate in habilitation programs (as trainees or employees) during normal daytime work hours and live at the Wipper home the balance of the time. The men are all "vulnerable adults" within the meaning of Minn. Stat. 626.557, subd. 2(b).

3. In September or early October of 1988, Ms. Hipper separated from her husband, Gerald Wipper, and moved into the basement of her adult foster home in St. Cloud. Her 17-year-old son, Randy Wipper (born February 10, 1971), moved with her.

4. Randy Wipper had difficulty adjusting to the separation of his parents. He began drinking alcohol to excess and, on more than one occasion, became involved in alcohol-related incidents at the Wipper home. Specifically:

(a) Sometime after 4:00 a.m. on a Sunday morning in September 1988, during the weekend Dolores Wipper had planned to leave her husband and move to St. Cloud, Randy Wipper, his friend Steve Groinus, and Ms. Wipper's boyfriend, Maynard Gunnerson, came to the Wipper home in St. Cloud. They had been hunting and were armed. They had also been drinking, and were talking loudly. Randy Hipper began to load one of the guns in the dining room located on the floor occupied by the residents. He continued to load after being told to stop by the person supervising the home. Randy left the home with the loaded gun; and

(b) One evening in late December 1988, Randy, who was intoxicated, became angry when Ms. Wipper and her boyfriend were about to leave the home. Randy pulled a hunting knife from a sheath at his waist and brandished it, threatening to cut the tires on his mother's van. This incident also took place on the floor where the residents live; and

(c) Shortly after 4:00 p.m. on March 13, 1989, Sande Scherer, the Stearns County Developmental Disability Case Officer assigned to Ms. Wipper's residents, arrived at the Wipper home with Ron Golden, who had come home early after being hurt on his job. Randy Wipper, his friend Steve Groinus, and two other young people were sitting in the kitchen drinking beer. Packs of beer were visible on the kitchen counter; and

(d) On March 21, 1989, De Harris, the County's Licensing Social Worker for adult foster care, wrote to Ms. Wipper and ordered that Randy Wipper be required to submit to a chemical dependency evaluation. Randy had undergone such an evaluation in the spring of 1988, after being stopped in Wright County for drunken driving (later reduced to open bottle and consumption of alcohol by a minor), and refused to subject himself to another one. After the County informed Ms. Wipper that Randy had to be evaluated again or move from the Hipper home, and Randy again refused, Ms. Wipper required him to move out. Randy has not lived at the Wipper home in St. Cloud since April 1989.



5. Steve Groinus, a teenaged friend of Randy Wipper's, moved into the Wipper home and lived in a second-floor "attic" room for approximately two weeks in late 1988 or early 1989. During that time, when the four above-named residents receiving adult foster care also lived in the home, the Wippers had a total of five roomers and residents.

6. One Saturday in late October or early November 1988, Dolores Wipper began a shift at the Wipper home at 12:00 noon, but left early after her husband came to the house and assaulted her boyfriend. Ms. Wipper feared her husband would return and do more damage, so she left the home for an undetermined amount of time after failing to find an employee to relieve her. When a substitute employee did arrive at 6:00 p.m., neither Ms. Wipper nor any other staff persons were at the home to supervise or tend to the residents, who were present.

Ms. Wipper was scheduled to return to work at the home at noon on the Sunday of that weekend, but did not show up. The employee on duty stayed overtime at the home waiting for Ms. Wipper, and did not leave until Randy Wipper came to the home sometime that evening. Randy was intoxicated. The residents had gone to bed, Randy went downstairs and the employee left the home. No one supervised the residents in connection with getting them up, feeding them, dispensing medications or getting them off to work the following morning. Randy Wipper was still asleep in the basement apartment, and by the time Dolores Wipper arrived, the residents had gone to their day activities. Under the terms of their Individual Habilitation Plans, all of the residents of the Wipper home had to be supervised while in the home and could not be left alone overnight.

7. The Agency considers the Licensee to be a good provider of adult foster care services. Her years of experience as a provider have been untainted by controversy or licensing problems until the above-described period in the fall and winter of 1988-89. Since Randy Wipper moved from the home in April 1989, there have been no problems regarding violations of Ms. Wipper's adult foster care license. As a result, in its written recommendation to the Department of Human Services on June 20, 1989, the county recommended that disciplinary action against Ms. Wipper's license be limited to one year's probation, during which there were to be no violations of adult foster care license rules (Minn. Rules 9555.5105 - .6265), Ms. Wipper must notify the

Agency when persons move in and out of the home and Randy Wipper is not allowed to live at the home.

8. On July 21, 1989, the Department of Human Services issued a letter purporting to be a denial of application for licensure to Ms. Wipper, basing the denial on violations of adult foster care rules regarding cooperating with licensing studies, weapons in homes and neglect of residents. The rule violations alleged were based on summaries of facts surrounding the incidents noted in Findings 4, 5 and 6 above. However, the Department's "denial" letter overlooked the fact that Ms. Wipper was a licensee, not an applicant for licensure, and made no mention of appropriate level of discipline (probation, suspension or revocation) for her license. The county's recommendation for probation was not addressed. Ms. Wipper filed a timely appeal.

At the hearing, the Agency and the Licensee waived any procedural objections regarding the form of the written determination from the Department of Human Services and stipulated that both sides would present their evidence

regarding the factual allegations and allow the Commissioner to determine appropriate disciplinary action, if any, against the Licensee. In its final argument and brief, the Agency reiterated its recommendation that disciplinary action in the form of probation for one year be taken against the Licensee.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and Commissioner of Human Services have jurisdiction herein pursuant to Minn. Stat, 14.50 and 245A.08.

2. The Notice of Hearing was proper and all substantive and procedural requirements of law or rule have been fulfilled.

3. Any of the foregoing Findings of Fact more properly considered Conclusions of Law are hereby adopted as such.

4. In hearings involving adult foster care licenses, the Agency has the burden of proving, by a preponderance of the evidence, facts that support the taking of disciplinary action against the Licensee. In this case, the Agency has met that burden.

5. Randy Wipper, a household member of the Licensee's home, violated Minn. Rule 9555.6125, subp. 4I on several occasions in late 1988 and early 1989 by abusing alcohol to the point where it had a negative effect on the health or safety of residents of the home, as noted at Finding 4.

6. By refusing to submit to a chemical dependency evaluation in March of 1989, Randy Wipper violated Minn. Rule 9555.6125, subp. 5.

7. On two occasions in the fall of 1988, Randy Wipper violated Minn. Rule 9555.6225 by loading a gun and brandishing a hunting knife in an area within the adult foster home occupied by residents receiving adult foster care services.

8. By allowing Steve Groinus to stay at the Wipper home for an extended period of time, the Licensee violated Minn. Rule 9555.6165, subp. 2, which limits the total number of roomers and residents in an adult foster home at one time to four. Groinus was a roomer within the meaning of Minn. Rule 9555.5105, subp. 33.

9. One weekend in the fall of 1988, the Licensee violated Minn. Rule 9555.6195 by neglecting her residents within the meaning of Minn. Stat. 626.557, subd. 2(e)(1) when they were left unsupervised overnight on Saturday

and Sunday of the same weekend.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the adult foster care license of Dolores Wipper be placed on probation for one year, upon the following conditions:



(a) the Licensee remains in full compliance with Minn. Rules 9555.5105.6265; and

(b) the Licensee report immediately to the Agency any change in the identity of roomers and residents at the Wipper home; and

(c) that Randy Wipper not reside at the Wipper home.

Dated this 7th day of December, 1989.

RICHARD C. LUIS  
Administrative Law

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

#### MEMORANDUM

The Administrative Law Judge agrees with the recommended discipline advanced by the Agency -- that Ms. Wipper's license be made probationary for one year. He is persuaded that the rule violations noted in this Report, although serious, were temporary aberrations in the otherwise excellent record of a capable, qualified provider of adult foster care.

The incidents constituting rule violations are all confined to a period when the Licensee's son had trouble adjusting to the breakup of his parents' marriage and the developing relationship between his mother and another man. One of the results of Randy Wipper's confusion and difficulties was abuse of alcohol, a potential danger to any youth his age even absent the forces playing on Randy. That situation has been averted by Randy's moving out of the home and not involving himself in care or supervision of the residents. Ms. Wipper's rule violations, except for the rooming of Steve Groinus at the home, are attributable to the tumult involved as she moved away from her husband and

established her relationship with another man. During one unfortunate weekend, the frictions resulting from those changes made the Licensee's physical presence at the home unsafe for her, but she had no one to cover the shift she was scheduled to serve, and the home's residents were left unsupervised on two nights. There is no evidence of prior or subsequent neglect of these residents. Placing Ms. Wipper's license on probation for a significant amount of time strikes a balance between punishment fitting the seriousness of the violations of statute and rule proven in this case and the Licensee's value to her community as a skilled, experienced provider of adult foster care services.

With respect to burden of proof, the Administrative Law Judge has decided that the County has the burden of proof in this matter because Minn. Stat.

245A.08, at subds. 3(a) and 3(c), shifts the burden of proof to a licensee, when the Agency shows reasonable cause for taking disciplinary action, only in cases involving a "family day care or foster care license". The Judge is persuaded that the word "family", as used above, modifies "foster" as well as "day" care. Such an interpretation limits the application of the statute, which is an exception to general principles of evidentiary and procedural law regarding burden of proof, to two specific types of human services licenses. See-also, Minn. Rule 1400.7300, subp. 5. There is no "foster care" license issued by the Department or authorized by statute or rule. In order to give the statute meaning, the word "family" must be meant as a modifier of both "day care" and "foster care" licenses. Since there is separate licensure for family foster care services, and both "family" licenses involve caring for children, the interpretation accepted herein is appropriate.

When the Legislature enacted the burden of proof exception in 1983, the exception shifting the burden of proof to licensees after an agency showing of reasonable cause was specifically limited to cases involving family day care and family foster care licenses. The Legislature did not amend that law, which was codified in Minn. Stat. 245.801, subd. 4, in 1987 when it passed the Human Services Licensing Act (Minn. Stat. Ch. 245A). Rather, Section 245.801 was repealed in its entirety, and the burden of proof provisions were codified under Section 245A.08, subd. 3. In the process, the words of the statute were rearranged without, in this respect, changing the meaning.

Minn. Stat. 645.19 provides, in part: ". . . Exceptions expressed in a law shall be construed to exclude all others." If the Legislature meant to expand coverage of the exception to more than the two classes of licensure to which exceptions were specifically, separately extended in 1983, it would have

listed the other types of human services licenses intended for coverage under the exception. Absent such a showing of intent, the Administrative Law Judge interprets "family" to modify "foster" as well as "day" care.

The legislative history of Minn. Stat. 245A.08 does not directly address this issue. When the legislation (then House File 1210) was first introduced, the provision did not specify any particular type of license to limit the class of licenses subject to a shifting burden of proof. The bill came before the Social Services Subcommittee of the Health and Human Services Committee on April 8, 1987. At that hearing, Rep. Wynia moved to amend H.F. 1210 to read "license of family-day care or foster-care" and "proof i in hearings involving

suspension, immediate suspension revocation or making probationary a family day care or foster care license ." (New language underlined.) The Subcommittee approved this amendment. Margaret Sandley, a staff member of the Department of Human Services, summarized the bill before the Subcommittee. In referring to the effect of the language in the original H.F 1210, Ms. Sandley stated that the bill was a "clarification of the vague language in current law with no substantive changes."

The Legislature was clearly aware of the number and variety of classes of care for which licenses are issued. The Subcommittee approved H.F. 1210 for presentation to the Health and Human Services Committee. On April 9, 1987, Rep. Wynia introduced H.F. 1210, as amended, to the Committee. In her remarks, Rep. Wynia referred to the bill as "recodification of existing language." Further, she stated:

This bill deals basically with . . . individuals who would provide a variety of services, daycare for children, a variety of residential and nonresidential services for disabled adults and children in both hospital settings, foster home settings and group home settings.

The limitation restricting the shifting of the burden of proof to categories of licenses specifically named in Minn. Stat. 245.801, subd. 4 was before the Department in the context of another contested case at the time of the Subcommittee meeting. The exception was interpreted in the Administrative Law Judge's Memorandum in Minnesota Department of Human Services v. Price's Center-for Child development Inc. (Recommendation filed February 4, 1987, OAH No. 7-1800-744-2). In that case, the Administrative Law Judge concluded that a shifting burden of proof in a case against a group family day care license was not permitted under Minn. Stat. 245.801, subd. 4 since that particular type of license had not been mentioned in the statute. The final Order of the Department in the Price's,Center case, issued June 23, 1987, upheld the Judge's Recommendation in this respect, citing, in part, the Legislature's decision not to extend the scope of the exception.

Although not defined in the Department's rules, "family foster care" is found in Minn. Rule 9545.0140. "Adult foster care" is defined, but in a completely different chapter of the rules. Minn. Rule 9555.5105. At no place in the rules is "foster care" defined or referred to as a category of license. Applying the conclusion in Price's Center and reading the language of Minn. Stat. 245A.08, either "family" modifies both "day care" and "foster care" or the burden of proof may be shifted only in family day care cases. The lack of a modifier for "foster care" would render the term meaningless for failure to specify the particular licenses to which the statute applies. Most persuasive, however, is the Department's own assertion, made before the Subcommittee, that Minn. Stat. 245A.08 did not make any "substantive changes" in the existing law. Since the law then applied only to family day care and family foster care, so now the statute applies only to family day care and family foster care.

The County asserts that family day care, adult foster care and child foster care should be treated as a single class of care, since the Legislature directed the Department to not implement Minn. Stat. 245A.04 (providing for background checks of license applicants) until appropriate rules had been adopted, except for child foster care, adult foster care and family day care homes. Minn. Stat. 245A.04, subd. 3(g) (1989 Supp.). There is, however,

another explanation for exempting those three types of care from delayed implementation. In each case, rules had been adopted which provided for background checks prior to issuance of the license. The Legislature recognized that Minn. Stat. 245A.04 could be implemented through existing rules of the Department in these areas. Rather than subjecting those rules to question, the exemption ratifies the pre-existing rule. Minn. Stat. 245A.04, subd. 3(g) is not a basis for creating a class of care which must be treated identically.

R.C.L.